In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1933

UNITED STATES OF AMERICA, APPELLANT

v.

CITIZENS AND SOUTHERN NATIONAL BANK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION TO AFFIRM

Appellees' contentions notwithstanding, the issues in this case are of substantial and continuing importance to competition in the banking industry. Their resolution will affect both correspondent relationships among independent banks competing in the same market, and the legality of acquisitions among such banks.

1. Appellees have ignored the fact that the district court's holding here invites widespread resort to similar *de facto* branching arrangements by other banks to avoid the constraints of the antitrust laws. They rely upon an erroneous characterization of such arrangements as an ordinary correspondent relationship (J.S. App. 28a), which is inconsistent not only with the court's other finding that the relationship eliminated all "existing substantial competition" among the banks (J.S. App. 66a), but also with the record and with the general understanding of corres-

pondent relationships. True correspondent relationships are vertical, wholesale, customer-supplier arrangements by which a large bank furnishes services to a smaller bank in return for a fee or for a deposit of a correspondent balance (J.S. 24, n. 18).[1] The arrangement here, however, goes far beyond that, because it extends horizontally so as to change the "five percent banks" from independent customers for C&S' banking services, into *de facto* branches of the C&S system.

Moreover, the arrangement here directly eliminates price competition. For example, in February 1970, C&S National notified the five percent banks of its intent to raise its service charges on regular checking accounts in Atlanta (DX 188). At that time some of the five percent banks had service charges schedules different from C&S National (DX 302). But on April 1, 1970, every defendant bank adopted the identical charges for both regular and special checking accounts (DX 302).

Thus, this case involves not simply the exchange of past price information which affected current pricing practices, as in *United States* v. *Container Corp.*, 393 U.S. 333. It shows a classic arrangement fixing actual current prices.

2. Appellees, like the district court, seriously misconceive the law of agreement under the Sherman Act. While conceding that the five percent banks are legally independent entities "perfectly free to deviate from * * * [C&S'] suggestions" (Motion, p. 16), they simul-

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[1]See also, Austin and Solomon, *A New Antitrust Problem: Vertical Integration in Correspondent Banking*, 122 U. Pa. L. Rev. 366, 367-373 (1974).

taneously contend, and the district court found, that the banks functioned as *de facto* branches. Such a relationship could not exist without tacit agreement by all concerned as to the day-to-day operation of the banks as integral parts of the C&S system. Whether their arrangement is characterized as "involuntary control," "*de facto* branching," or, to use the latest formulation, "elaborate and effective, although informal, linkages" (*id.* at p. 10), the record compels an inference of agreement. *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 193-195.

3. The record refutes appellees' theory that the government's charges involve market extension efforts by C&S that eliminate only *potential* competition. The complaint alleged, and the record shows, that these arrangements were challenged because they eliminated actual competition between C&S and the five percent banks, in violation of the Sherman Act,[2] and because they were inconsistent with the standards applicable to horizontal mergers under the Clayton Act.[3]

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[2]*E.g.*, Complaint, paras. 34, 38-44, which alleged that C&S and others "entered into a combination" with each of the five percent banks and others, pursuant to which "C&S National and each of the five percent banks have, in many instances jointly determined the competitive strategy to be followed in conducting the business of each bank" and thus that the combination violated Section 1.

[3]*E.g.*, Complaint, para. 48, which alleged "that actual competition and the potential for increased competition," was and would be eliminated and restrained, that competition in the banking markets alleged would be lessened, and that concentration would be increased.

4. There is no merit in appellees' attempt to justify the relationship between the banks on the ground that other methods of expansion were barred by Georgia law (Motion, pp. 6, 13). Georgia law required that the banks be operated as independent entities (J.S. 14, n. 10), and the Sherman Act bars agreements eliminating price and service competition between independent firms. The *de facto* branch relationship was thus illegal both under Georgia law and the Sherman Act (J.S. 8, n. 4). It follows that appellees' chief justification for their acquisition of the five percent banks—that the banks do not compete—rests upon an unacceptable premise, because this lack of competition is a direct result of a violation of Section 1 of the Sherman Act.

5. Appellees suggest that this case has no future significance because any similar relationships among competing banks will be subject to scrutiny by the Board of Governors of the Federal Reserve Board under the 1970 Amendments to the Bank Holding Company Act, 12 U.S.C. 1841 *et seq.* (Motion, p. 6, n. 6), declaring that a bank is a holding company if it exercises a controlling influence over the management and policies of the other banks. However, the Board, in determining whether a holding company relationship exists or should be authorized under the Bank Holding Company Act, applies the banking criteria of that Act, not the antitrust laws. Even if the Board were to approve, for purposes of the Bank Holding Company Act, a *de facto* relationship of the kind found by the district court here, that would not provide antitrust immunity (12 U.S.C. 1849(a)), and serious questions would remain about the legality of the

relationship under the Sherman Act. Moreover, if the district court's decision is upheld, other banks may be expected to seek shelter from the antitrust laws by expanding correspondent relationships into "*de facto* branches" and then justifying the acquisition of those "branches" on that ground.[4]

CONCLUSION

For the reasons stated in the jurisdictional statement and this reply brief, probable jurisdiction should be noted.

Respectfully submitted.

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Solicitor General.

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[4]Recent examples of this development are shown in *First City Bancorporation of Texas, Inc. - Meyerland Bank*, 60 F.R.B. 506 (1974); *Florida Bancorp., Inc. - Lighthouse Point Bank*, 59 F.R.B. 816 (1973); *Michigan National Corporation - First Nat'l. Bank of East Lansing*, 59 F.R.B. 819 (1973); *First Int'l. Bancshares, Inc. - University State Bank*, 59 F.R.B. 813 (1973); *First Tulsa Bancorporation, Inc. - Southeastern State Bank*, 59 F.R.B. 289 (1972).